

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-10-38**

**PANEL:** Ms Laura Diamond

**APPEARANCES:** The Appellant, [text deleted], was not present at the appeal hearing;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Alison Caldwell.

**HEARING DATE:** February 16, 2011

**ISSUE(S):**

- 1. Whether the Appellant is entitled to Income Replacement Indemnity and Personal Injury Protection Plan benefits as a result of injuries arising out of the motor vehicle accident.**
- 2. Whether the above mentioned appeal should be dismissed upon the grounds of abandonment.**

**RELEVANT SECTIONS:** Sections 182, 189, and Division 2 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

**Reasons For Decision**

A Notice of Appeal was filed by the Appellant on March 10, 2010 in respect of an Internal Review Decision relating to Income Replacement Indemnity ("IRI") benefits. The Notice of Appeal contained the Appellant's address at [text deleted].

The Commission was advised by the Appeals Officer who had conduct of this appeal that:

- On March 22, 2010 the Appeals Officer contacted the Appellant requesting that he provide a copy of the relevant Internal Review Decision dated October 20, 2009.
- On March 30, 2010 the Appeals Officer wrote to the Appellant reminding him that the Commission was awaiting receipt of a copy of the Internal Review Decision.
- On April 6, 2010 the Appeals Officer received a voicemail message from the Appellant advising that he had spoken with a lawyer and would no longer be pursuing his appeal. Accordingly, the Appeals Officer sent a letter and Notice of Withdrawal Form to the Appellant for completion.
- On April 13, 2010 the Appellant contacted the Appeals Officer and advised that he had changed his mind and wanted to pursue his appeal. The Appeals Officer requested that he provide a copy of the relevant Internal Review Decision as well as his reasons for late filing and the Appellant advised that he would send both to the Commission.
- On April 20, 2010 the Appeals Office wrote to the Appellant asking him to provide a copy of the Internal Review Decision as well as written reasons for late filing of his appeal, by May 5, 2010.
- On May 10, 2010 the Appeals Officer contacted the Appellant who advised that he had reconsidered and would not be proceeding with his appeal. He undertook to complete and return the withdrawal form previously provided.
- On July 12, 2010 the Appeals Officer left a voicemail message for the Appellant requesting information regarding the as yet uncompleted Notice of Withdrawal Form.
- On August 11, 2010 the Appeals Officer spoke with the Appellant who advised that he was not sure whether he was withdrawing his appeal and would get some advice and advise the Commission accordingly.

- On October 8, 2010, the Appeals Officer sent out a letter to the Appellant with a Notice of Withdrawal Form.
- On November 8, 2010 the Appellant contacted the Commission and advised that he had a meeting scheduled with the Ombudsman and would be contacting the Commission to advise whether he will pursuing his appeal.
- On November 22, 2010 the Appeals Officer spoke with the Appellant who advised that he would not be proceeding with his appeal. The Appeals Officer sent a letter and Notice of Withdrawal Form to the Appellant.
- On December 17, 2010 the Appeals Officer contacted the Appellant who advised that he had misplaced the Notice of Withdrawal Form but once he was able to locate it he would send the form in.
- On December 29, 2010 the Appeals Officer left a voicemail message for the Appellant asking if he had sent in his form. No reply was received.
- On January 7, 2011 the Appeals Officer sent the Appellant a letter with a Notice of Withdrawal Form and a self-addressed, self-stamped envelope to the Commission. No reply was received.

The Commission's secretary was instructed by the Commission to set this appeal down for a hearing and, as a result, a hearing was set for February 16, 2011 at 10:30 a.m., at the Commission's office in Winnipeg. The Notice of Appeal also contained the following information:

“The subject of the hearing is to determine whether the appeal has been abandoned.

At this hearing, you will have the opportunity to make submissions that you have not abandoned your appeal.

If you do not attend the hearing, the Commission may consider whether you have abandoned your appeal. Alternatively, the Commission may proceed with the hearing of your appeal and may issue its final decision.

The time and date are firm; postponements will only be granted under extraordinary circumstances.”

The Commission’s secretary further advised the Commission that:

- On January 27, 2011 the Commission sent a Notice of Hearing to the Appellant by Xpresspost and by Regular Mail (a copy of which is attached hereto and marked as Exhibit A) in respect of this appeal. The Notice of Hearing was forwarded by Canada Post by regular mail to the Appellant’s address at [text deleted], being the address that the Appellant put in his Notice of Appeal. This Notice of Hearing was not returned to the Commission by Canada Post.
- In respect of the Xpresspost mail, the Notice was claimed under the signature of [the Appellant] on February 1, 2011.

**Appeal Hearing:**

The appeal hearing commenced on February 16, 2011 at 10:30 a.m. The Appellant did not attend at that time. MPIC’s legal counsel, Alison Caldwell, was present at the commencement of the hearing.

**Service of Notice:**

At the commencement of the hearing, MPIC’s legal counsel submitted that the Appellant had been properly served with a Notice of Hearing pursuant to Sections 184.1(1)(b) and 184.1(2) of the MPIC Act, which provides as follows:

### **How notices and orders may be given to appellant**

[184.1\(1\)](#) Under sections 182 and 184, a notice of a hearing, a copy of a decision or a copy of the reasons for a decision must be given to an appellant

(b) by sending the notice, decision or reasons by regular lettermail to the address provided by him or her under subsection 174(2), or if he or she has provided another address in writing to the commission, to that other address.

### **When mailed notice received**

[184.1\(2\)](#) A notice, a copy of a decision or a copy of reasons sent by regular lettermail under clause (1)(b) is deemed to be received on the fifth day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, he or she did not receive it, or did not receive it until a later date, because of absence, accident, illness or other cause beyond that person's control.

The Commission notes that the address at [text deleted] was the address which was indicated in the Appellant's Notice of Appeal dated March 10, 2010, and that the Appellant's signature was shown as the recipient's signature on the Canada Post Tracking form for the Notice of Hearing.

The Commission finds that pursuant to Section 184.1(1) and 184.1(2) of the MPIC Act the Appellant is deemed to have received the Notice of the Commission's hearing scheduled for February 16, 2011 on February 1, 2011.

### **Abandonment of the Appeal:**

MPIC's legal counsel submitted that the Commission was entitled to dismiss the Appellant's appeal on the grounds that the Appellant had abandoned his appeal and had not established on a balance of probabilities that he was entitled to IRI benefits as a result of a physical impairment of function relating to the motor vehicle accident.

Counsel submitted that the Commission has considered the issue of abandonment of an appeal in the appeals of *[text deleted]* ([2008] M.A.I.C.A.C.D. No. 27) and *[text deleted]* (AC-04-71). In those decisions the Commission adopted the criteria set out by the Manitoba Court of Appeal in *Fegol v. Asper*, 2004 MBCA 115 in determining whether an appeal before that Court had been abandoned. The criteria to be considered are:

1. There must have been a continuous intention to prosecute the appeal from the time when the documents in question should have been properly filed;
2. there must be a reasonable explanation for the failure to file the documents; and
3. there must be arguable grounds of appeal.

Counsel submitted that the Appellant had not shown a continuous intention to prosecute his appeal. In fact, on three separate occasions he indicated to the Commission that he would be withdrawing his appeal. The most recent date the Appellant confirmed he would not be proceeding with the appeal was November 22, 2010 and since that date the Appellant had made no indication of intending to proceed with the appeal. Rather, he indicated that he would be sending a completed Notice of Withdrawal Form.

Counsel submitted that the Commission had not had any contact from the Appellant since December 17, 2010 and submitted that the Appellant had shown an intent to abandon his appeal while simply neglecting to send in a Notice of Withdrawal Form.

MPIC also submitted that the Appellant had not provided any explanation for failing to pursue his appeal, and as such, there could not be a determination of reasonableness allowing the Appellant to meet this requirement.

In regard to whether there were arguable grounds for the appeal, counsel submitted that the Appellant's entitlement to IRI benefits as set out in Regulation 39/94 had been properly determined in this case. The Appellant's ground for appeal was that he did not have pain in his back before the accident. However, based upon the objective medical evidence on the file, this is not an arguable ground for the appeal.

[MPIC's Doctor], a medical consultant with MPIC's Health Care Services Team, has opined that the symptoms of lumbar strain the Appellant developed following the motor vehicle accident were consistent with those he suffered from prior to the motor vehicle accident.

The Appellant sought the advice of a lawyer and spoke with the Ombudsman, yet still indicated that he would be withdrawing his appeal. Counsel submitted that had the Appellant been able to develop arguable grounds for appeal, he would not have indicated an intention to withdraw at any point.

Therefore counsel submitted that the Appellant did not have reasonable grounds for an appeal, and that his appeal should be dismissed and considered abandoned.

**Discussion:**

The Commission agrees with counsel for MPIC that the principles set out in the appeals of *[text deleted]* (supra) and *[text deleted]* (supra) and of the Manitoba Court of Appeal in *Fegol v. Asper* (supra) are relevant to the issues of abandonment in this appeal.

Based upon a review of the Appellant's conduct as set out by the Appeals Officer and noted by counsel for MPIC, the Commission concludes that the Appellant's conduct clearly indicated that he had no continuous intention of processing his appeal. On several occasions, he indicated to the Commission's Appeals Officer that he intended to withdraw his appeal and to file a Notice of Withdrawal. The Commission also finds that the Appellant did not provide any reasonable explanation to the Commission for delaying processing of his appeal, and failed to respond to several inquiries by the Commission, whose office took all reasonable steps by telephone and by letter to contact the Appellant in order to set a date for the appeal hearing, but was unable to reach him. Then, in spite of receiving service of the Notice of Hearing, the Appellant failed to attend at the hearing set for his appeal.

In respect of the merits of the appeal, the Commission finds that the Appellant did not have any arguable grounds to proceed with the appeal and has failed to establish, on a balance of probabilities, that he suffered from a physical impairment of function relating to the motor vehicle accident. The Commission therefore determines that the Appellant failed to establish, on a balance of probabilities, that MPIC incorrectly denied him benefits.

In summary, the Commission concludes that the Appellant abandoned his appeal for the following reasons:

1. There was not a continuous intention by the Appellant to prosecute the appeal from the time he filed his Notice of Appeal.
2. The Appellant did not provide a reasonable explanation for delaying the process of his appeal,
3. There were no arguable grounds for his appeal.



The Commission, for these reasons, confirms the Internal Review Officer's decision dated December 20, 2009 and dismisses the Appellant's appeal.

Dated at Winnipeg this 17<sup>th</sup> day of March, 2011.

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**LAURA DIAMOND**